

1050 CONNECTICUT AVENUE, N.W.
TENTH FLOOR
WASHINGTON, D.C. 20036

(202) 772-1981 FACSIMILE (202) 318-4257
johnelogan@msn.com

JOHN E. LOGAN PLLC
ATTORNEY AT LAW

November 13, 2003

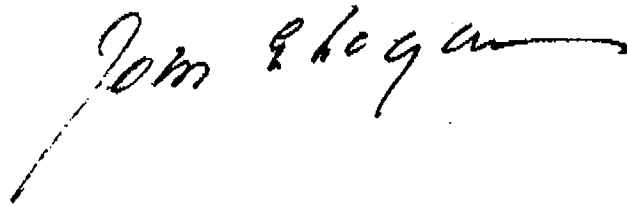
Ms. Marlene H. Dortch
Secretary of the
Federal Communications Commission
Washington, D.C. 20554

Re: Ex Parte Submission
Docket ET 03-158, MB 03-159

Dear Ms. Dortch:

Pursuant to the Commission's rules, attached is an ex parte submission relating to the above proceedings.

Respectfully,

A handwritten signature in black ink, appearing to read "John E. Logan", with a long, sweeping horizontal line extending to the right.

attachments

1050 CONNECTICUT AVENUE, N.W.
TENTH FLOOR
WASHINGTON, D.C. 20036

(202) 772-1981 FACSIMILE (202) 318-4257
johnnelogan@msn.com

November 13, 2003

JOHN E. LOGAN PLLC
ATTORNEY AT LAW

Via facsimile and electronic mail

Mr. David Roberts
Senior Attorney
Media Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Proposed Protective Order
Dockets ET 03-158, MB 03-159

Dear Mr. Roberts:

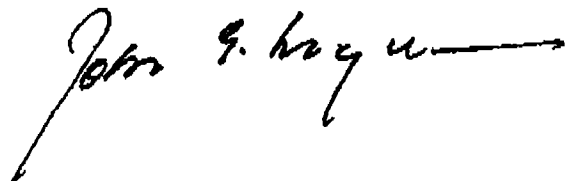
On behalf of the Police Department of the City of New York (Department), we have reviewed the Comments and Reply Comments submitted in proceedings addressing our proposal regarding channel 16 in the New York Metropolitan area, ET Docket 03-158 and MB Docket 03-159. As a procedural matter, and to facilitate resolution of the issues by the Commission, the Department reiterates its proposal to afford parties who have filed comments in the proceedings access to the Technical Report which describes the public safety communications infrastructure in the New York Metropolitan area. This proposal is conditioned upon the Technical Report being accorded confidential treatment under Sections 0.457 and 0.459 of the Commission's rules and that the Commission issue a Protective Order to ensure that the information is not released to the public in general.

In an effort to expedite consideration, to afford parties who have filed comments an opportunity to review the Technical Report, and to maintain the security of the information contained in the report, attached is a draft Order Adopting Protective Order and draft Protective Order for the Commission's consideration. In addition to establishing the parameters of how the Technical Report may be used and by whom, the drafts seek to establish a confined time period to obtain access and examine the report.

On behalf of the Police Department of the City of New York, we appreciate your examination of this matter. A copy of this letter, with attachments, will be filed with the Commission's Secretary as an ex parte submission and served on those parties that filed comments or reply comments in the above proceedings.

Respectfully,

attachments

A handwritten signature in black ink, appearing to read "John E. Logan", with a long horizontal line extending to the right.

1050 CONNECTICUT AVENUE, N.W.
TENTH FLOOR
WASHINGTON, D.C. 20036

(202) 772-1981 FACSIMILE (202) 318-4257
johnnelogan@msn.com

JOHN E. LOGAN PLLC
ATTORNEYS AT LAW

December 11, 2002

Ms. Marlene H. Dortch
Secretary of the Federal Communications Commission
Washington, D.C. 20554

Re: Request for Confidential Treatment
Report of the Police Department of the City of New York,
December 5, 2002

Dear Ms. Dortch:

Pursuant to the Commission's rules relating to the Freedom of Information Act, 47 C.F.R. sections 0.457 and 0.459, the Police Department of the City of New York ("Department") requests confidential treatment of information marked "Proprietary and Confidential" in the attached report relating to the public safety communications conducted on channel 16 in the New York metropolitan area. This purpose of this request is to protect critical systems, facilities, and other law enforcement assets from security breaches and harm. The release of this information would endanger the life or physical safety of law enforcement personnel and citizens. The Department is submitting a public redacted version of its report together with a nonpublic, unredacted version filed under seal with this request.

1) Identification of the specific information for which confidential treatment is sought.

The Department requests that the attached information marked as "Proprietary and Confidential" be treated as exempt from the Freedom of Information Act (FOIA) under exemptions 2 and 7. The documents for which confidential treatment is being requested contain sensitive information regarding the public safety communications infrastructure in the New York metropolitan area, the release of which would cause harm to these facilities and place in danger law enforcement officers, other public safety personnel and citizens.

Submitted via Fed/EX # 836598192330

2) Identification of the Commission proceedings in which the information was submitted or a description of the circumstances giving rise to the submission.

On March 17, 1995, the Federal Communications Commission released its Order waiving Parts 2 and 90 of its rules to permit the temporary assignment of frequencies in the 482-488 MHz band, broadcast channel 16, to public safety agencies in the New York City Metropolitan area.¹ The purpose of the report by the Department is to review the circumstances relating to channel 16 and to urge the Commission to make the authorization permanent and designate channel 16 as part of public safety land mobile operations in the New York Metropolitan area.

3) Explanation of the degree to which the information is exempt from disclosure under the FOIA

Exemption 7 of the FOIA, as amended, protects from disclosure "records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information ... (F) could reasonably be expected to endanger the life or physical safety of any individual." Exemption 7(F) was designed "to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained." The information for which nondisclosure is requested is critical to how law enforcement networks operate, is key to effective emergency response and investigation and is relied upon by those entrusted with such responsibilities. The release of this information would compromise these responsibilities and endanger the life and safety of law enforcement officers, other public safety officers, and the public. The Commission's regulations, 47 CFR 0.457(g), explicitly recognize this exemption.

Additionally, exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices" of an agency. In light of recent terrorism events and heightened security awareness and in recognition of the concomitant need to protect the nation's critical infrastructure² the Attorney General has made clear that Exemption 2 is of fundamental importance to homeland security and provides for the withholding of sensitive critical infrastructure information of current law enforcement significance.³ The information sought to be protected from disclosure relates to core public safety infrastructure facility (transmission, repeater, and antennae) locations throughout the New York metropolitan areas and the specific frequencies on which these communications take place. The information describes the most sensitive portions of the public safety communications system in New York. The release of such

¹ *In the Matter of the Waiver of Parts 2 and 90 of the Commission's Rules to Permit the New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHz on a Conditional Basis*, FCC 95-115, 10 FCC Rcd 4466 (March 17, 1995).

² See *USA PATRIOT Act of 2001*, 42 U.S.C.A. § 5195c (2002) (defining "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters").

³ *Attorney General FOIA Memorandum Issued*, posted October 15, 2001, (highlighting government's "need to protect critical systems, facilities, stockpiles, and other assets from security breaches"), www.doi/oip.gov

information poses great risk to this communications system security and to those individuals who depend upon it.

The courts have upheld the non disclosure of similar information under exemption 2. One court has noted, in according exemption 2 protection to details of an agency's computer system, that gaining access even to "the procedures involved in utilizing the [system] would give individuals incentive to attempt to obtain access to the [system] in order to use the knowledge they have obtained."⁴ Cases applying exemption 2 in this context do so on the premise of affording so-called "circumvention" protection to items of sensitive information - the release of the information would provide an opportunity to undermine the very instrument the information relates to, in this case critical public safety communications networks.⁵ Notably, exemption 2 has been applied to nonpersonnel-related federal law enforcement documents that were widely disseminated to nonfederal law enforcement agencies.

4) Explanation of how disclosure of the information could result in substantial harm.

If this information, the specifics of the public safety communications infrastructure, were to be made public, it would provide interests that seek to harm the United States the opportunity not only to disrupt these critical communications networks but to do so in circumstances that would interfere with emergency response and investigation. The information could be used by interests seeking to endanger the life of law enforcement officers, other public safety officers and the public.

5) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

As compiled and consolidated in the report, the information is maintained in a confidential status by the New York City Police Department and the Suffolk County Police Department. Segments of the information are provided to other public safety agencies to coordinate channel 16 operations and various databases encompassing the licensing process. The consolidated information is provided to the appropriate frequency coordinator, the regional frequency coordinator, who is a law enforcement officer, and the staff of the Federal Communications Commission. The information is not otherwise available in such a consolidated and structured format.

⁴ *Oliva v. Department of Justice*, Civil No. 84-5741, slip op. at 2 (S.D.N.Y. Feb. 28, 1986).

⁵ See *Dirksen v. IHS*, 803 F.2d at 1457 ("instructions for computer coding"); *Wightman v. BATF*, 755 F.2d 979, 982 (1st Cir. 1985) (computer codes); see also *Hall v. Department of Justice*, Civil No. 87-0474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (protecting various items that "could facilitate unauthorized access to [agency] communications systems"), *Windels, Marx, Davies & Ives v. Department of Commerce*, 576 F. Supp. 405, 413 (D.D.C. 1983).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Amendment of Parts 2, 73, 74 and 90 of the
Commission's Rules to Permit New York
Metropolitan Area Public Safety Agencies to
Use Frequencies at 482-488

ET Docket 03-158
MB Docket 03-159

ORDER ADOPTING PROTECTIVE ORDER

Adopted:

Released:

By the Chief, Media Bureau:

1. On December 5, 2002, the Police Department of the City of New York (Department) submitted a report to the Commission regarding the allocation of TV channel 16 in the New York Metropolitan area. Accompanying the report was a Technical Report, presented in both a redacted and complete format, that described the public safety communications infrastructure in the New York Metropolitan area. Subsequent to the submission of the report the Commission commenced the above proceedings. The Department has offered to provide interested parties who have submitted comments in the proceedings access to the Technical Report conditioned on the Commission's confirmation that the information provided be treated as confidential under Sections 0.457 and 0.459 of the Commission's rules. 47 C.F.R. §§0.457 and 0.459. The Department states that the information is entitled to confidential treatment because of the need to protect critical systems, facilities, and other law enforcement assets from security breaches and harm and that the release of this information would endanger the life or physical safety of law

enforcement personnel and citizens.

2. The Comments and Reply Comments submitted in these proceedings indicate the requests of parties to review the Technical Report. It is appropriate to provide this information so long as the confidentiality of this information is maintained and the parties agree to abide by the conditions contained in Commission's Order. The public interest will be served by issuing the attached Protective Order (Appendix A). It will afford parties who have filed Comments and/or Reply Comments in the above proceedings access to the information while maintaining the security of the information. Granting the attached Protective Order will facilitate the prompt resolution of the issues raised in this proceeding.

4. Accordingly, IT IS ORDERED, that the request for confidential treatment is Granted consistent with the attached Protective Order.

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX A
PROTECTIVE ORDER

1. On December 5, 2002 the Police Department of the City of New York (Department) submitted a report to the Commission regarding the allocation of TV channel 16 in the New York Metropolitan area. The Commission has commenced proceedings to examine the issues addressed by the report. With its report the Department submitted to the Commission a Technical Report which it requests be accorded confidential treatment because of the need to protect the public safety communications infrastructure in the New York Metropolitan area. The Department also submitted a public redacted version. Because the information contains confidential information, the Bureau hereby enters this Protective Order to ensure that the Technical Report provided to the Commission and considered by the Department to be confidential is afforded protection.

2. *Non-Disclosure of Confidential Document.* Except with the prior written consent of the Department, or as hereinafter provided under this Order, neither the Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. "Confidential Document" shall mean the material submitted by the Police Department of the City of New York, in a letter dated December 11, 2002, wherein it requested confidential treatment and the issuance of a protective order.

3. *Permissible Disclosure.* Subject to the requirements of Paragraph 5, the Confidential Document may be reviewed by associated counsel of record of parties who have submitted Comments and/or Reply Comments in the proceedings. Subject to the requirements of Paragraph 5 and subject to the obligation to secure the confidentiality of the Confidential Document in accordance with the terms of this Order, such counsel may disclose the Confidential Document to any of the following persons: (i) the associated attorneys, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (ii) Commission officials involved in this proceeding; (iii) outside consultants or experts retained for the purpose of assisting counsel in these proceedings and (iv) the party, through its principal, officers or employees, of any entity filing comments or reply comments in these proceedings.

4. *Access to Confidential Document.* Persons described in Paragraph 3 shall have the obligation to ensure that access to the Confidential Document is strictly limited as prescribed in this Order. Such persons shall further have the obligation to ensure: (i) that the Confidential Document is used only as provided in this Order; and (ii) that the Confidential Document is not duplicated except as necessary for filing at the Commission under seal as provided in Paragraph 7.

5. *Procedures for Obtaining Access to the Confidential Document.* In all cases where access to the Confidential Document is permitted pursuant to Paragraph 3, and before reviewing or having access to the Confidential Document, each person seeking such access shall execute the Acknowledgment of Confidentiality attached hereto and file it with the Commission

Draft

and serve it upon the Department so that it is received by the Department five business days prior to such person's reviewing or having access to the Confidential Document. The Department shall have an opportunity to object to the disclosure of the Confidential Document to any such person. Any objection must be filed at the Commission and served on counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment of Confidentiality. Until any such objection is resolved by the Commission and any court of competent jurisdiction prior to disclosure, and unless that objection is resolved in favor of the person seeking access, persons subject to an objection from the Department shall not have access to the Confidential Document. Notwithstanding the foregoing, the individuals listed on Appendix C attached hereto shall be provided with a copy of the Confidential Document upon receipt by the Department of each such person's Acknowledgment of Confidentiality.

6. *Requests for Additional Disclosure.* If any person requests disclosure of the Confidential Document outside the terms of this protective order, such requests will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.

7. *Use of Confidential Information.* Persons described in Paragraph 3 may, in any documents that they file in this proceeding, reference information found in the Confidential Document or derived therefrom (hereinafter, "Confidential Information"), but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of the pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential information included pursuant to Protective Order, ET 03-158 and MB 03-159" and

d. The confidential portion(s) of the pleading shall be filed with the Secretary of the Commission and served on the Department. Such confidential portions shall be filed under seal, and shall not be placed in the Commission's Public Files. A party filing a pleading containing Confidential Information shall also place a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's Public Files. Parties may provide, under seal, courtesy copies to Commission staff of pleadings containing Confidential Information.

8. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Department of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing parties, by viewing this material: (a) agree not to assert any such waiver; (b) agree not to use information derived from the Confidential Document to seek disclosure in any other proceeding; and (c) agree that accidental

disclosure of Confidential Information by the Department shall not be deemed a waiver of any privilege or entitlement as long as the Department takes prompt remedial action.

9. *Subpoena by Court or Other Agencies.* If a court or another administrative agency subpoenas or orders production of the Confidential Document or Confidential Information that a party has obtained under terms of this Order, such party shall promptly notify the Department of the pendency of such subpoena or order. Consistent with the independent authority of any court or administrative agency, such notification must be accomplished such that the Department has a full opportunity to oppose such productions prior to the production or disclosure of the Confidential Document or Confidential Information.

10. *Client Consultation.* Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of the Confidential Document; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not disclose the Confidential Document or Confidential Information, unless the client and individuals employed by the client have complied with the provisions of Paragraphs 3 and 5.

11. *Violations of Protective Order.* Persons obtaining access to the Confidential Document or Confidential Information under this Order shall use the information solely for preparation and the conduct of this proceeding as delimited in Paragraphs 4, 7 and 10, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such information for any other purpose, including business, governmental, commercial, or other administrative, regulatory or judicial proceedings. Should a party that has properly obtained access to Confidential Information under this Order violate any of its terms, that party shall immediately notify the Commission and the Department of such violation. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violation of this Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Department at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

12. *Termination of Proceeding.* The provisions of this Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding (which includes any administrative review or judicial review), the Confidential Document and all copies of same shall be returned to the Department. No material whatsoever derived from the Confidential Document may be retained by any person having access thereto, except outside counsel to a party in this proceeding may retain, under the continuing strictures of this Order, two copies of each pleading containing Confidential Information prepared on behalf of that party. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the Department not more than three weeks after conclusion of this proceeding.

13. *Additional Rights Preserved.* The entry of this Order is without prejudice to the rights of the Department to apply for additional or different protection where it is deemed necessary or the rights of any reviewing party to request further or renewed disclosure of the Confidential Document. .

14. Department's representative- For purposes of this Order any notice to the Police Department of the City of New York shall be made to John E. Logan, Special Counsel to the Police Department of the City of New York, 1050 Connecticut Avenue, NW, Tenth Floor, Washington, D.C. 20036, phone 202.772.1981, facsimile, 202.318.4257.

15. Time Period- Any request for access to the Confidential Document shall take place between xxx, 2003, and xxxx 2003.

14. *Authority.* This Order is issued pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 310(d); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and authority delegated under Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283; and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX B

ACKNOWLEDGMENT OF CONFIDENTIALITY

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding and I understand it. I agree that I am bound by this Order and that I shall not disclose or use the Confidential Document or any information gained therefrom except as allowed by the Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order accrues to the Police Department of the City of New York.

Without limiting the foregoing, I acknowledge specifically that my access to any information obtained as a result of the Order is due solely to my capacity as counsel to, or representative or employee of, a party or other person described in Paragraph 3 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Order.

Executed at _____ this ____ day of _____, 2003

Signature

Title

Draft

APPENDIX C

Thomas P. VanWazer, Esquire
Counsel to the Tribune Television Company

Wray Fitch, Esquire
Timothy R. Obitts, Esquire
Counsel for Catholic Views Broadcasters

Julian L. Shepard, Esquire
Counsel for K Licensee, Inc.

John J. Mullaney
Mullaney Engineering, Inc.